

REMARKS

These remarks are submitted in response to the Final Office Action ("FOA") of September 9, 2003. The FOA objects to the drawings under 37 C.F.R. § 1.83(a), rejects claims 23 and 35 under 35 U.S.C. § 112, first paragraph, and rejects claims 7 and 22-46 under 35 U.S.C. § 112, second paragraph. The FOA rejected claims 1-4, 14-16, 22, 25-27, 34, 36-39 and 46 under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent 5,261,532 to Fauci ("Fauci"), claims 1, 2, 5, 11-13, 15, 16, 19 and 21 under 35 U.S.C. § 102(b) as being anticipated by U.K. Patent Application No. 8138586 to Hardy et al. ("Hardy"), claims 1, 2, 7, 8, 11-13, 15-17 and 19-21 under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent 4,131,200 to Rinfret ("Rinfret"), and claims 22, 24, 25, 28, 31, 32, 34, 36, 37, 40, 43, 44 and 46 under 35 U.S.C. § 102(e) as being anticipated by U.S. Patent 6,485,177 to Bell ("Bell"). Finally, the FOA rejected claims 1-5, 7-23, 25-30, 33-35, 37-39, 41, 42, and 45 under 35 U.S.C. § 103(a) as being unpatentable over Bell in view of Hardy.

In this amendment, Applicants have amended the drawings without adding new matter. Applicants have also amended claims 1, 7, 15, 16, 21, 22 and 34 and explained why the claims, as now amended, are patentable over the cited art. The amendments to the claims are supported by the specification and drawings as filed. Applicants respectfully request a notice of allowance for the pending claims.

1. Drawings

The FOA objected to the drawings under 37 C.F.R. § 1.83(a) as failing to show every feature of the invention specified in the claims, specifically various method steps. As the claims in question pertain to methods of forming or providing various features of Applicants' invention that are clearly indicated in the existing figures (e.g. a column 40 in FIGS. 1, 2 and 7, a removable section 50 in FIG. 6, a second piercing point 52 in FIG. 7, a compartment 11 and a column 40 in FIGS. 1 and 2, a cutout 42 in FIGS. 1, 2 and 5, and a removable portion 50 in FIG. 6), Applicants do not believe the nature of the subject matter admits of illustration by drawing or makes drawings necessary, as required by 35 U.S.C. §113.

However, Applicants have amended FIG. 4 to help illustrate forming or providing the aforementioned features. No new matter has been added. Applicants respectfully submit that the amendments made to FIG. 4 overcome the 37 C.F.R. § 1.83(a) objection. Applicants respectfully request the objection be reconsidered and withdrawn.

2. Claim Rejections – 35 USC §112, First Paragraph

The FOA rejected claims 23 and 35 under 35 U.S.C. § 112, first paragraph. Specifically, the FOA asserts that the first and second surfaces being “part of a single panel” or “part of a single flexible panel” are new matter.

Applicants respectfully disagree with the FOA and submit that the quoted claim language is adequately supported by the specification as filed. For example, in addition to stating that, in one embodiment, the “flexible pouch compris[es] a compartment formed by a first panel sealed to a second panel,” the specification also states that, in one embodiment, the “flexible pouch ... compris[es] a compartment defined by a panel.” *Specification As Filed*, p. 2, ll. 14-15 & 20-21. Applicants’ position is further supported by originally filed claim 21, which is considered part of the original disclosure and which also states that, in one embodiment, the “flexible pouch” comprises “a compartment defined by a panel.” *Specification As Filed*, p. 12, ll. 21-22. It is also noteworthy that the specification states, “[i]n further embodiments the column 40 may be placed on a single panel.” *Specification As Filed*, p. 5, ll. 8-9.

Based on these disclosures, one skilled in the art would realize that the compartment and the column of the flexible pouch do not necessarily need to be formed from two panels, but could, in one embodiment, be formed from a single panel. For at least these reasons, Applicants respectfully submit that the rejected aspects of claims 23 and 35 are supported by the specification and, as a result, are not new matter. Consequently, Applicants respectfully request that the 35 U.S.C. § 112, first paragraph rejections of claims 23 and 35 be reconsidered and withdrawn.

3. Claim Rejections – 35 USC §112, Second Paragraph

The FOA rejected claims 7 and 22-46 under 35 U.S.C. § 112, second paragraph. The FOA rejected claim 7 because it depends from a canceled claim. Claim 7 has been amended to depend from a pending claim. Therefore, Applicants respectfully request that the 35 U.S.C. § 112, second paragraph rejection of claim 7 be reconsidered and withdrawn.

With respect to claims 22-46, the FOA asserts that claims 22-46 are indefinite because the method used to seal the first to the second surface has not been clearly defined to set forth the structure of the “the seal of the internal end.” Applicants respectfully disagree with this assertion.

The specification as filed states that the panels “may be sealed together by heat sealing, heat welding, ultrasonic sealing or other methods known in the art, such as adhesives and crimping.” *Specification, p. 3, ll. 18-20.* Independent claims 22 and 34 recite the following limitation: “wherein the seal of the internal end is formed by the same method as the seal used to seal the first surface to the second surface.” The point of this limitation is not to describe the specific method utilized to form the seals of the pouch and column, but to indicate that the seals of the pouch and column are formed through the same method. Therefore, whatever method is utilized to seal the first surface to the second surface, the same method is also utilized to form the seal.

For these reasons, Applicants respectfully submit that claims 22-46 are not indefinite. Applicants respectfully request that the 35 U.S.C. § 112, second paragraph rejection of claim 22-46 be reconsidered and withdrawn.

4. Claim Rejections – 35 USC §102

The FOA rejected claims 1-4, 14-16, 22, 25-27, 34, 36-39 and 46 under 35 U.S.C. § 102(b) as being anticipated by Fauci, claims 1, 2, 5, 11-13, 15, 16, 19 and 21 under 35 U.S.C. § 102(b) as being anticipated by Hardy, claims 1, 2, 7, 8, 11-13, 15-17 and 19-21 under 35 U.S.C. § 102(b) as being anticipated by Rinfret, and claims 22, 24, 25, 28, 31, 32, 34, 36, 37, 40, 43, 44 and 46 under 35 U.S.C. § 102(e) as being anticipated by Bell. Applicants have amended claims 1, 7, 15, 16, 21, 22 and 34 and offer the following argument distinguishing the claims from the cited art.

A claim is anticipated only if each and every element as set forth in the claim is found in a single prior art reference. MPEP § 2131.

a. Fauci

Fauci discloses a reusable plastic bag. As best understood from Figs. 3 and 4 of Fauci, Fauci's first and second flexible panels, which form the sides of the bag, are spatially offset from each other and are joined together by the second end wall 30 and the partition wall 35 to form the third chamber 33a (i.e., the alleged column). In other words, unlike the inventions recited in independent claims 1 and 15, Fauci's alleged column does not include "a first seam and a second seam, wherein each seam is formed by the first and second panels being placed in contact with each other at the location of a seam and sealed together, and a portion of the first seam is substantially parallel to a portion of the second seam. Similarly, Fauci's compartment is not "formed by sealing a first surface to a second surface by placing said surfaces together at a seam location and sealing the surfaces together at the seam location, wherein said surfaces are generally opposing," as recited in independent claim 22.

For at least these reasons, Fauci fails to anticipate independent claims 1, 15 and 21 and their respective dependent claims. Therefore, Applicants respectfully request that the anticipation rejections based on Fauci be reconsidered and withdrawn.

b. Hardy

Hardy discloses a pouch-like bag “intended for containing a liquid for medical or surgical use, such as a liquid for intravenous injection which is to be dispensed by means of a conventional hospital drip feed system.” *Hardy*, p. 2, ll. 63-68. Thus, Hardy is not “[a] flexible pouch for holding a beverage for removal via a drinking straw,” as recited in independent claims 1 and 15, or “[a] flexible pouch for storing a juice product,” as recited in independent claim 21. Furthermore, unlike independent claim 21, Hardy’s column is not “adapted to receive a drinking straw,” and Hardy’s piercing point is not “adapted to be pierceable by the drinking straw for removal of the juice from the compartment.”

In Hardy, the seams 19 that form its passage 20 (column) are parallel at their interior ends. In other words, unlike the inventions recited in independent claims 1 and 15, Hardy does not have a column with “interior end portions [that] gradually diverg[e] from each other.”

For at least these reasons, Hardy fails to anticipate independent claims 1, 15 and 21 and their respective dependent claims. Therefore, Applicants respectfully request that the anticipation rejections based on Hardy be reconsidered and withdrawn.

c. Rinfret

Rinfret discloses a bag having “walls enclosing a fluid storage compartment for holding biologically active material such as blood platelets.” *Rinfret, abstract*. Thus, Rinfret is not “[a] flexible pouch for holding a beverage for removal via a drinking straw,” as recited in independent claims 1 and 15, or “[a] flexible pouch for storing a juice product,” as recited in independent claim 21. Furthermore, unlike independent claim 21, Rinfret’s column is not “adapted to receive a drinking straw,” and Rinfret’s piercing point is not “adapted to be pierceable by the drinking straw for removal of the juice from the compartment.”

As indicated in Figs. 1, 3 and 4 of Rinfret, the seams that form Rinfret’s passages 13, 14 (columns) are parallel at their interior ends. In other words, unlike the inventions recited in independent claims 1 and 15, Rinfret does not have a column with “interior end portions [that] gradually diverg[e] from each other.”

For at least these reasons, Rinfret fails to anticipate independent claims 1, 15 and 21 and their respective dependent claims. Therefore, Applicants respectfully request that the anticipation rejections based on Rinfret be reconsidered and withdrawn.

d. Bell

Bell discloses "a flexible stand-up pouch having ... a seal perimeter surrounding an open interior. In a portion of the seal perimeter, there is provided a peel seal region [adjacent to] an unsealed region." *Bell, abstract.* Bell states,

[a] variety of techniques can be utilized for the formation of the peel seal.

Two general techniques useable are:

1. Utilization for the panel materials, a plastic film material having an appropriate coating thereon to allow for activation by selected heat and pressure to generate a peel seal, as opposed to a permanent seal, if desired. It is foreseen that if such material is utilized, it would be of a type for which if an alternate pressure/heat combination is selected, a permanent seal can be provided, as is desired in other portions of the construction. ... Further, a resin formulated to result in a peel seal may be added. ...

2. Utilization of a peel seal tape, permanently secured to the panels.

... For this variation, a two-layer peel seal tape is permanently secured to the panels. ... The peel seal can be readily formed by applying appropriate heat and pressure to direct panel sections 150, 151 together in the region of the peel seal tape with heat and pressure applied in other portions of the arrangement where the panel sections 150 and 151 do not have peel seal tape therebetween, to form permanent seals.

Bell, col. 10, ll. 28-67; col. 11, 1-2. In other words, when Bell is forming a "peal seal," its method utilizes different pressures, temperatures and/or materials as compared to its method of forming a "permanent seal region" to achieve a "peal seal" that has less adherence strength per square inch of seal than the adherence strength per square inch of a "permanent seal region."

Thus, Bell is unlike Applicants' inventions as recited in independent claims 22 and 34, because Bell's "peel seal region" is made by a different method from its "permanent seal regions."

For at least these reasons, Bell fails to anticipate independent claims 22 and 34 and their respective dependent claims. Therefore, Applicants respectfully request that the anticipation rejections based on Bell be reconsidered and withdrawn.

5. **Claim Rejections – 35 USC §103**

The FOA rejected claims 1-5, 7-23, 25-30, 33-35, 37-39, 41, 42, and 45 under 35 U.S.C. § 103(a) as being unpatentable over Bell in view of Hardy. In order for a combination of references to establish a case of *prima facie* obviousness, three requirements must be met:

1. there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine the reference teachings;
2. there must be a reasonable expectation of success; and
3. the prior art references when combined must teach or suggest all the claim limitations.

MPEP §2142.

- a. **The necessary suggestion or motivation for the Bell/Hardy combination is lacking because Hardy is nonanalogous to Applicants' claimed invention.**

The Federal Circuit has said, "[t]he genius of invention is often a combination of known elements which in hindsight seems preordained. To prevent hindsight invalidation of patent claims, the law requires some 'teaching, suggestion or reason' to combine cited references. When the art in question is relatively simple, as is the case here, the opportunity to judge by hindsight is particularly tempting. Consequently, the tests of whether to combine references need to be applied rigorously." *McGinley v. Franklin Sports, Inc.*, 262 F.3d 1339, 1351 (Fed. Cir. 2001) (cites omitted).

Applicants respectfully submit that the necessary suggestion or motivation for the Bell/Hardy combination is lacking, because Hardy is nonanalogous art. For art to be analogous,

it must be: (1) from the same field as the inventor's endeavor; or (2) "reasonably pertinent to the particular problem with which the inventor is involved." *In re Clay*, 966 F.2d 656, 658-59 (Fed. Cir. 1992).

i. Hardy is not from the same field as Applicants' endeavor.

In *Clay*, the claimed invention pertained to the introduction of gel into the confined dead volume of an oil storage tank. *Id.* at 659. The cited reference pertained to use of gel in underground oil-bearing formations. *Id.* The PTO argued that Clay's invention and the cited reference were both directed to the common endeavor of maximizing withdrawal of petroleum stored in petroleum reservoirs. *Id.* The Federal Circuit disagreed and said that the cited reference could not be considered to be within Clay's field of endeavor "merely because both relate to the petroleum industry." *Id.* The Federal Circuit found that Clay and the cited reference did not share common fields of endeavor because Clay's field of endeavor pertained to the storage of refined liquid hydrocarbons, and the cited reference pertained to the extraction of crude petroleum. *Id.*

Like Clay, the FOA cannot find that Applicants' invention and Hardy are analogous merely because they are both flexible containers for holding fluids and have columns with parallel walls. Applicants' invention is directed to a flexible pouch drink container configured to help users, especially children, insert a drinking straw into the pouch. The column is to be oriented upwards when the straw has been inserted into the pouch. Applicants' invention is not concerned with maintaining a leak-proof seal about the straw once it has penetrated the pouch.

Hardy discloses a pouch-like bag "intended for containing a liquid for medical or surgical use, such as a liquid for intravenous injection which is to be dispensed by means of a conventional hospital drip feed system." *Hardy*, p. 1, ll. 5-8. With Hardy, a needle is inserted in a passage 20 to penetrate the frangible seal 21. *Hardy*, p. 3, ll. 57-60. The passage 20 "fits closely around [the needle] to prevent leakage." *Id.* Hardy's bag relies on gravity to remove its contents from the bag and is oriented during use so that its passage 20 is at the bottom of the bag.

Applicants' invention and Hardy are both directed to specialized, narrow fields. Applicants' invention is directed to a beverage container, while Hardy is directed to a

medical/surgical liquids container. Thus, Applicants respectfully submit that Hardy is not from the same field as Applicants' endeavor.

ii. Hardy is not reasonably pertinent to the particular problem with which the Applicants are involved.

A reference is reasonably pertinent if it is one that, because of the matter with which it deals, logically would have commanded itself to an inventor's attention in considering his problem. *In re Clay*, 966 F.2d at 659. As a result, the purposes of both the invention and the cited reference are of importance. *Id.* If the cited reference is directed to a different purpose, the inventor would accordingly have less motivation or occasion to consider it. *Id.*

In *Clay*, the Federal Circuit said that the cited reference was faced with the problem of recovering crude petroleum from subterranean formations of sedimentary rock having voids. The court found this was not reasonably pertinent to the particular problem with which Clay was concerned (i.e., obtaining refined petroleum products from the dead volumes of storage tanks). *Id.* at 659-60.

With respect to the rejection of Applicants' claimed invention, Hardy was faced with the problem of using a needle to access medical liquids contained in a pouch-like bag without causing leakage or contamination of the liquid. *Hardy*, p. 1, ll. 5-8; p. 2, ll. 84-85 & 110-111; p. 3, ll. 58-59. On the other hand, Applicants were faced with the problem of providing a flexible beverage pouch especially designed to be easily opened via a drinking straw wielded by a child. Thus, like the cited reference in *Clay*, Hardy is not reasonably pertinent to the problem faced by Applicants. Also, as explained above, Hardy is not from the same field as Applicants' endeavor. Consequently, Applicants respectfully submit that the necessary suggestion or motivation for the Bell/Hardy combination is lacking because, Hardy is nonanalogous to Applicants' claimed invention. For at least these reasons, Applicants respectfully request the reconsideration and withdrawal of the obviousness rejections based on the Bell/Hardy combination.

b. The Bell/Hardy combination fails to teach or suggest all of the claim limitations.

Independent claims 1 and 15 recite, “a first seam and a second seam, ... wherein a portion of the first seam is substantially parallel to a portion of the second seam, and wherein the first and second seams each have an interior end portion, said interior end portions gradually diverging from each other.” The wider interior end of the column allows a drinking straw to be moved around inside the compartment of the flexible beverage pouch to better collect the contents of the compartment. *Specification as Filed*, p. 6, ll. 4-6.

The FOA admits that the Bell/Hardy combination does not teach this aspect of independent claims 1 and 15. *FOA*, p. 6, ¶ 2. Furthermore, Applicants respectfully submit it would not be within the ordinary skill in the art to modify the Bell/Hardy combination to provide for the recited feature, because Hardy’s parallel passage 20 “fits closely around [the needle] to prevent leakage.” *Hardy*, p. 3, ll. 57-60. Thus, the passage disclosed in Hardy does not provide sufficient clearance around the needle to allow the needle to displace within the passage to take advantage of the wider interior end of the column. Additionally, Hardy teaches away providing this clearance and widening the interior end of the Hardy passage, because it would decrease the ability of the passage to “prevent leakage.” For at least these reasons, Applicants respectfully submit that the Bell/Hardy combination does not make independent claims 1 and 15 and their dependent claims obvious. Accordingly, Applicants request the reconsideration and withdrawal of the obviousness rejections based on the Bell/Hardy combination.

CONCLUSION

In view of the above amendments and preceding remarks, it is respectfully urged that the rejection of the claims be reconsidered and withdrawn and that pending claims 1-5 and 7-46 be allowed. However, should any issue remain unresolved, the Examiner is invited to telephone the undersigned to expedite the allowance.

Respectfully submitted,

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